STATE OF MICHIGAN

COURT OF APPEALS

MARY JO NEHRING,

Plaintiff-Appellant,

V

MOORE HOME BUILDERS, INC., THOMAS CURRAN, and D.S. BUILDING CONTRACTORS, INC.,

Defendants-Appellees,

and

CITY OF SALINE, MARK MASSINGELL, VARSITY GROUP, INC., and ERGOMETRICS INTERNATIONAL, INC.,

Defendants.

UNPUBLISHED
February 19, 2004

No. 245694
Washtenaw Circuit Court
LC No. 01-001335-NO

Before: Neff, P.J., and Wilder and Kelly, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals by right the trial court's grant of summary disposition to defendants[1] based on MCR 2.116(C)(10).[2] We affirm.

[1] Throughout this opinion, "defendants" refers to Moore Home Builders, Inc., Thomas Curran, and D.S. Building Contractors, Inc.

[2] The trial court's order granting summary disposition does not indicate on which subrule it based its decision, however, defendants requested summary disposition pursuant to MCR 2.116(C)(10) and it is apparent that the trial court made the determination that no genuine issues of material fact precluded the entry of judgment in defendants' favor.

I. Facts and Proceedings

On May 8, 2001, as plaintiff walked her dogs on the sidewalk adjacent to Old Creek Drive in Saline, she approached an area where the sidewalk had been removed, filled with gravel, and partially covered by a broken piece of plywood. Plaintiff paused when she approached the gravel-filled area, recognized tire ruts in the gravel, and began to walk slowly across the gravel, taking care to avoid the broken board. Before completely crossing the gravel, however, plaintiff fell forward and hit her elbow on the sidewalk abutting the gravel. Plaintiff testified that she believes that the gravel gave way under her feet and that she slipped and fell.

As a result of her fall, plaintiff suffered a comminuted right radial head fracture and other minor injuries. She subsequently sued defendant Curran, the owner of the property adjacent to the sidewalk; defendant Moore Home Builders, Inc., (Moore) the builder of the residence on Curran's property; and defendant D.S. Building Contractors, Inc., the company that removed the sidewalk at Moore's request. Plaintiff alleged that each defendant created an "unreasonably dangerous defective condition" and violated its duty to plaintiff to guard the unsafe area or maintain the excavated portion of the sidewalk in a safe manner.[3]

Following discovery, defendants joined in the city of Saline's motion for summary disposition pursuant to MCR 2.116(C)(10)[4] and argued that the open and obvious doctrine precluded plaintiff's premises liability claims. Defendant D.S. Building Contractors, Inc., also argued in its motion that it was entitled to summary disposition because it did not have possession and control of the property when plaintiff fell. The trial court granted defendants' motions, concluding that the complained of condition was open and obvious and that plaintiff could have avoided it by crossing the street or walking on the grass adjacent to the sidewalk. The trial court denied plaintiff's subsequent motion for reconsideration. Plaintiff now appeals.

II. Standard of Review

We review de novo a trial court's decision on a motion for summary disposition. *Joyce v Rubin*, 249 Mich App 231, 234; 642 NW2d 360 (2002). When reviewing the grant of a motion filed pursuant to MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions and other evidence submitted in the light most favorable to the nonmoving party. *Id.*, quoting *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If no genuine issues of material fact exist, the moving party is entitled to judgment as a matter of law. *Joyce, supra*, quoting *Maiden, supra*.

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[3] Plaintiff alleged similar claims against corporations owned by Curran, Varsity Group, Inc., and Ergometrics International, Inc, as well as an alleged construction coordinator on the project, Mark Massingell (whose name is also spelled "Massingill" in the record). Plaintiff also sued the city of Saline based on its statutory duty to maintain the sidewalk. Plaintiff ultimately dismissed these claims.

[4] The city of Saline's motion was based on plaintiff's level of fault but discussed the open and obvious doctrine as well. The trial court denied the city's motion, stating that whether plaintiff was more than fifty percent at fault was a question of fact for the jury.

III. Analysis

Plaintiff first argues that the open and obvious doctrine does not apply because defendants admitted that the condition at issue was not dangerous. We disagree.

In order to prevail on her negligence claim, plaintiff must establish that defendants owed her a duty; that they breached the duty they owed her; and that their breach caused her to suffer injuries. *Hampton v Waste Mgmt of Michigan, Inc*, 236 Mich App 598, 603; 601 NW2d 172 (1999). The duty owed by a possessor of land to an individual entering the land is determined by the individual's status as an invitee, licensee, or trespasser. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). Because the parties refer to plaintiff as both a licensee and an invitee, we first briefly address plaintiff's status on the land in order to properly analyze her claim. Here, the undisputed evidence leads us to conclude that plaintiff was not an invitee because she did not enter the property in response to an invitation to conduct commercial business on the property. *Id.* at 596-597, 604. Plaintiff was merely walking her dogs on the sidewalk when she fell. Consequently, we conclude that she was a licensee, having entered the property with the owner's consent to the public's customary use of the sidewalk. *Pippin v Atallah*, 245 Mich App 136, 142; 626 NW2d 911 (2001).

The duty owed to a licensee was reiterated by our Supreme Court in *Stitt, supra,* citing *Wymer v Holmes*, 429 Mich 66, 71 n 1; 412 NW2d 213 (1987):

> A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit.

The open and obvious doctrine applies to negate the duty normally owed by a landowner to a licensee. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 612; 537 NW2d 185 (1995). As this Court stated in *Pippin, supra* at 143,

> [a] possessor of land has no duty to give warning of dangers that are open and obvious, inasmuch as such dangers come with their own warning. Where there is a duty to a visitor to make a condition safe (i.e., the duty to an invitee), potential liability will remain for harm from conditions that are still unreasonably dangerous despite their open and obvious nature.

The duty to warn of unreasonably dangerous conditions that are open and obvious does not extend, however, to licensees.[5] *Id.*

Addressing plaintiff's argument that the open and obvious doctrine does not apply because defendants made dispositive admissions that the condition was not dangerous, we first

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[5] In light of this fact, the parties' arguments concerning whether special aspects of the gravel-filled sidewalk made it unreasonably dangerous are not relevant to our consideration of this case.

note that the statement on which plaintiff primarily relies, "no average person of ordinary intelligence would consider the condition dangerous," appears only in the reply brief filed by defendant Moore in the trial court. The other defendants did not concur in this brief. Accordingly, to the extent that this statement constitutes a concession, it pertains only to defendant Moore. Regardless, we read defendant Moore's statement as an attempt to refute plaintiff's claim that the condition presented a risk of harm that would trigger defendant Moore's duty to warn, rather than a concession that the open and obvious doctrine does not apply. The statement makes no sense in any other context because no duty would be owed to plaintiff because of a non-dangerous condition that was open and obvious. Clearly, defendant Moore was arguing that it had no duty to the plaintiff because the condition was not sufficiently dangerous to trigger a duty. Similarly, the other statements made by defendants and relied on by plaintiff, that the gravel itself was not inherently dangerous, that the gravel had been widely used, and that the gravel was frequently walked on by others at the site, all address either the absence of an initial duty-triggering danger or the absence of an *unreasonably* dangerous condition.

We must emphasize that if plaintiff contends that the open and obvious doctrine does not apply because the condition was not dangerous, plaintiff's theory of liability collapses unless there was a hidden defect, a claim we also reject, infra. As stated above, defendants owed plaintiff a duty to warn her of *dangers*. *Stitt, supra* at 596. Conversely, in the absence of a dangerous condition, defendants did not owe plaintiff a duty of care. Despite the contradictory nature of plaintiff's assertions, we will proceed to consider her claim that the trial court erroneously applied the open and obvious doctrine.

Plaintiff also asserts that the open and obvious doctrine does not apply in this case because "[t]his is a hidden defect claim" and "[t]he gravel was not what it appeared to be." We disagree. Whether a danger is open and obvious depends on whether "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Joyce, supra* at 238, quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Plaintiff's assertions that the condition here presented a hidden danger because an individual walking across the stones could not tell whether the stones were compacted or whether the foundation beneath the stones was uneven, are misplaced. Plaintiff testified that she saw tire tracks in the stones. An average user of ordinary intelligence would know that gravel stones roll or shift when pressure is applied to them, and that stones of this type are not uniform in size or shape and do not interlock.

In this regard, the instant case is distinguishable from *Hughes v PMG Building, Inc*, 227 Mich App 1, 11-12; 574 NW2d 691 (1997), plaintiff's arguments notwithstanding. In *Hughes*, this Court held that a jury could find that the risk of a porch overhang collapsing was not open and obvious because the plaintiff could not see how the overhang was attached to the house. *Id.* Here, however, the risk of injury did not depend on the condition of the unseen foundation under the stones. Whether the foundation was smooth or uneven, it was readily apparent that the loose gravel stones could shift with applied pressure. Moreover, plaintiff has not produced any evidence concerning the condition of the foundation beneath the gravel. Accordingly, we

conclude that the trial court properly found that the open and obvious doctrine precludes plaintiff's claim.[6]

Affirmed.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly

I concur in result only.

/s/ Janet T. Neff

[6] In light of our conclusion on this issue, it is not necessary for us to address defendant D.S. Building Contractor's argument that it did not have possession and control of the premises. Moreover, as this argument was explicitly waived in the trial court because plaintiff did not have sufficient time to respond to it, the issue has not been preserved for our review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).